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NO. 87-1038

IN THE

Supreme Court of the United States

October Term, 1987

THE CITY OF AURORA, by and through its MAYOR and CITY COUNCIL, STAN THOMISON and KENNETH L. PETERSON,

Petitioners,

v.

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS, and CHARLES FULTON, individually and on behalf of all persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

It is undisputed that the issues presented to the jury in this case stem from a late evening noise complaint received by the Aurora Police Department. Beyond that, the facts are in sharp dispute.

It is important to understand what this case is *not* about. It is not a class action lawsuit, nor a lawsuit seeking declaratory and injunctive relief. Rather, the case proceeded to jury determination under 42 U.S.C. § 1983 based solely on Respondents' damage liability claim.

Respondents' Brief can be read to imply that Respondents were unable to establish a class action after a hotly contested trial.

(Respondents' Brief, 3). In actual fact, the class action allegations were dismissed as a result of Petitioners' Motion to Dismiss, more than a year prior to trial.

Respondents state that they "were not able to establish the pattern and practice to the satisfaction of the trial court and those aspects of the claim were dismissed." (Respondents' Brief, 1). More accurately, because Respondents made no attempt in their case in chief to prove the requisite custom or policy, at the close of Respondents' case the district court granted the City, Mayor, and the City Council's motion for directed verdict and eliminated Respondents' claims for declaratory and injunctive relief.

Simply stated, Respondents seek to obfuscate the fact that only Respondents' claims for compensatory and punitive damages in the amount of two million dollars against the two police officers reached the jury, and that this case should properly be considered one for private damages.

In addition, Respondents imply that Respondents Fulton and Perkins each received favorable verdicts against the two police officers.[1] (Respondents' Brief, 2, 3). That was not the case. Plaintiff Fulton received a favorable verdict against Officer Peterson alone. Plaintiff Perkins received a favorable verdict against only Officer Thomison.

Respondents allege that the jury "found that the officers, after a series of verbal harassments of the Repondents, physically attacked, assaulted, and battered the persons of Respondents Fulton and Perkins." (Respondents' Brief, 2). The sole purpose of Respondents' unsupported and inaccurate characterization of

[1]Apparently, Respondents seek to blur the clear distinction between this case and *City of Riverside v. Rivera*, 54 U.S.L.W. 4845 (U.S. June 27, 1986) (No. 85-224), where the jury returned 37 individual verdicts in favor of the plaintiffs and against the City of Riverside and five police officers, and plaintiffs were awarded $33,350.00 in compensatory *and* punitive damages.

the jury's findings is to inflame. Further and more importantly, Respondents' mischaracterization strains credibility.

The verdict forms are found in Appendices A and B. If the jury had, in fact, determined that the conduct of the two police officers was so outrageous, how do Respondents account for the award of only one dollar each to Respondents Fulton and Perkins? As Senior Circuit Judge Barrett stated in the dissenting opinion (Petition for Writ of Certiorari, App. D, 28a):

> . . . What sort of vindication is indicated by virtue of a $1.00 award? It cannot be seriously contended that the jury believed that these plaintiffs were subjected to assault and battery, false arrest and outrageous conduct.

REASONS FOR GRANTING THE WRIT

I. The Standard Applied By The Court Of Appeals To Determine Whether Respondents Were Prevailing Parties Entitled To An Award Of Attorney's Fees Cannot Be Reconciled With *Hensley* Or With Other Circuits' Interpretation Of *Hensley*.

Respondents contend that in *Carey v. Piphus*, 435 U.S. 247 (1978), this Court determined that a party who receives nominal damages is a prevailing party for purposes of an award of costs and attorney's fees. Respondents conveniently overlook the fact that *Carey* dealt with a procedural due process violation. In this case, Respondents did not assert a procedural due process claim.

In *Carey*, this Court explained the special nature of a procedural due process violation, stating "[c]ommon-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." 435 U.S. at 266. No subsequent Supreme Court decision has elevated substantive due process claims of the type found in this excessive force case to the level of an "absolute" right found to have existed in *Carey*.

In *City of Riverside v. Rivera*, 54 U.S.L.W. 4845 (U.S. June 27, 1986) (No. 85-224), this Court reaffirmed that *Hensley v. Eckerhart*, 461 U.S. 424 (1983), indicates the factors to be considered in awarding attorney's fees under 42 U.S.C. § 1988. In *Hensley*, this Court explicitly stated that one "important factor" in determining the "reasonableness" of a fee award is the "result obtained". 461 U.S. at 434.

Respondents' argument that the issues raised by Petitioners have been decided by this Court and have been uniformly applied by the various Courts of Appeals is further weakened by Respondents' reliance upon *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983). Respondents state (Respondents' Brief, 6):

> . . . After hearing arguments, the Trial Court noted that it was being guided by the Tenth Circuit's decision in *Ramos*. *Ramos* was announced with the benefit of this Court's decision in *Hensley*. (Citation omitted).

The language in *Ramos*, however, clearly conflicts with the express language of *Hensley* and *Rivera*. Apparently, Judge McCoy recognized this as he did not cite *Ramos* in his opinion for the en banc court, even though *Ramos* was the basis for his dissent from the original panel opinion and the district court stated that it was guided by *Ramos*.

Accordingly, the Tenth Circuit's opinion conflicts with this Court's holdings in *Hensley* and *Rivera*. In addition, the *Hensley* decision has not been applied uniformly by the Courts of Appeals. This Court's review is necessary to resolve this conflict, and to address the lack of uniform application of the *Hensley* decision.

II. Assuming *Arguendo* That Respondents Are Prevailing Parties, The Award Of Attorney's Fees Must Be Discounted To Compensate For Their Very Limited Success.

In arguing that the award of attorney's fees was discounted by the trial court for the limited success achieved, Respondents ap-

parently concede that their award of attorney's fees must be discounted to compensate for their very limited success.

Respondents incorrectly contend that after determining the "lodestar" at 180.5 hours, the trial court decided that the attorney's fees should be reduced on the basis of the results achieved. (Respondents' Brief, 11). A review of the "Time Record" submitted by the Respondents in support of their Motion for Attorney's Fees and Costs reveals that this is simply not the case. (Respondents' Brief, Appendix 1, 7a).

Initially, the total number of hours claimed on the "Time Record" is 170.5 hours, not 180.5 hours as stated by Respondents. Petitioners filed a Statement in Opposition to Plaintiffs' Certificate of Attorney's Fees. (R., Vol. I, p. 33). In their Statement in Opposition, Petitioners argued for the deletion of any time spent exclusively on the state case[2], which was calculated to be 57.1 hours by Petitioners, and for the deletion of 10.5 hours for "miscellaneous letters and correspondence". If those deductions are made, Respondents' claimed hours are reduced to 102.9 hours. In other words, the district court reduced or "rounded off" Respondents claimed hours by only 2.9 hours to arrive at the 100 hour figure. This "rounding off" of only 2.9 hours allowed Respondents to receive an award of attorney's fees which was 6,225 times the damage award in the case.

The extremely limited success achieved by the Respondents bears no reasonable relationship to the amount of attorney's fees awarded and demonstrates conclusively that the district court not only failed to give "primary consideration" to the "results obtained" factor set forth in *Hensley*, but refused to give this crucial factor any consideration whatsoever.

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[2]The police officers initially filed suit against Respondents in state court and Respondents counterclaimed. After trial in the federal case, the state action was dismissed by stipulation.

III. The Court of Appeals' Decision Will Undermine The Purposes Underlying 42 U.S.C. § 1988.

Respondents cite with favor the quotation from *Cooper v. Singer*, 719 F.2d 1496, 1502 (10th Cir. 1983) (en banc), which is found on Page 13 of the Petition for Writ of Certiorari. (Respondents' Brief, 12). Petitioners cited *Cooper* for its discussion of the purposes underlying 42 U.S.C. § 1988. Respondents apparently concede that the twin purposes of 42 U.S.C. § 1988 are to provide meaningful access to the judicial process by individuals with civil rights grievances, and to force attorneys to critically evaluate the prospects of success of their claims.

Respondents, however, seek to divert attention from the lack of success of their claims and to convince this Court that their only purpose in filing suit in federal court was to vindicate their constitutional rights. In their Brief they state, " . . . [i]f the Respondents had only been interested in monetary damages they could have filed a suit in state court based on assault and battery." (Respondents' Brief, 9).

Respondents fail to mention that the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, contains limits of liability of $150,000 per plaintiff, or $400,000 in the aggregate. Thus, in a state lawsuit, Respondents would have been precluded from seeking two million dollars in monetary relief.

This lawsuit was not aimed at creating new law; rather, it was aimed solely at obtaining significant monetary damages for the Respondents. That goal was not achieved. By refusing to consider the "results obtained" factor set forth in *Hensley* and reaffirmed in *Rivera*, the Court of Appeals' decision undermines one of the purposes underlying 42 U.S.C. § 1988, which is to force attorneys to critically evaluate the prospects of success of their claim.

If the delicate balance between the twin purposes underlying 42 U.S.C. § 1988 is destroyed, there is nothing to prevent the

assessment of unconscionable attorney's fee awards in civil rights cases where monetary damages alone are sought, and insignificant monetary damages are ultimately awarded.

CONCLUSION

This case presents the Court with an ideal opportunity to further define the parameters of the term "prevailing party" in the context of an attorney's fee award under 42 U.S.C. § 1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marcia G. O'Brien, one of the attorneys for Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the twenty-second day of March, 1988, I served copies of the foregoing Petitioners' Reply Brief in Support of Their Petition for Writ of Certiorari on Respondents, Jewell Nephew, Rafus Perkins, Elaine Neloms and Charles Fulton, by depositing copies of Petitioners' Reply Brief in Support of Their Petition for Writ of Certorari in the United States Post Office located at 1823 Stout Street, Denver, Colorado, with first class postage prepaid, and properly addressed to their counsel of record:

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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-816

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS and CHARLES FULTON,
Plaintiffs,

vs.

STANLEY THOMISON and KENNETH PETERSON,
Defendants.

VERDICT FOR PLAINTIFF CHARLES FULTON

We the jury upon our oath do say that we find for the plaintiff Charles Fulton and against the following defendants:

Stanley Thomison: _____
(yes or no)

Kenneth Peterson: _____
(yes or no)

We fix compensatory damages at $_____.

On the separate question of punitive damages, we find as follows:

Stanley Thomison: $_____

Kenneth Peterson: $_____

Dated: _____

_____
Foreperson

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-816

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS and CHARLES FULTON,
Plaintiffs,

vs.

STANLEY THOMISON and KENNETH PETERSON,
Defendants.

VERDICT FOR PLAINTIFF RAFUS PERKINS

We the jury upon our oath do say that we find for the plaintiff Rafus Perkins and against the following defendants:

Stanley Thomison: _____
(yes or no)

Kenneth Peterson: _____
(yes or no)

We fix compensatory damages at $_____

On the separate question of punitive damages, we find as follows:

Stanley Thomison: $_____

Kenneth Peterson: $_____

Dated: _____

_____
Foreperson